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One Year Review of Civil Procedure and Appeals

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ONE YEAR REVIEW OF CIVIL PROCEDURE AND APPEALS

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The log jam of cases at issue in the Supreme Court was broken by full use of the rights granted to the Supreme Court to hear and determine cases in department under article VI, section 5, of the Colorado Constitution. Three hundred sixty-nine written opinions issued out of the Supreme Court in 1960, sixty-seven of which were written by outside county or district judges who sat with the court and wrote the opinions in accordance with the court's directions in department. In hearing cases in department, three justices of the Supreme Court always participated and oral argument was required in all cases. Moreover, the right to hear a case in department is limited to those cases where no constitutional right is involved under either the Colorado Constitution or the Constitution of the United States. Under the mandate of article VI, section 5 of the Colorado Constitution, no decision could be a judgment of the Supreme Court unless concurred in by at least three judges of the Supreme Court, and in many cases there was not unanimity of opinion among the three justices, and an *en banc* session of the court was required to voice the court's opinion.

In *Horton v. Colorado Springs Nat'l Bank*[1] the judgment was affirmed by operation of law when the chief justice did not participate and three judges voted for affirmance and three for reversal after the case was first heard in department. See *Scott v. Shook*[2] on the issue of the right to additional oral argument after a hearing in department.

A number of decisions construed the Rules of Civil Procedure and those decisions are reviewed in this article in the numerical order of the Rules. The author has endeavored to include in this article all decisions of the court which set forth, alter, or clarify the Rules of Civil Procedure.

RULE 12

A. Motion to Dismiss

The Supreme Court was called upon to determine whether a complaint stated a claim upon which relief could be granted in a number of cases.

The complaint for an accounting in *McKinney v. Christmas*[3] was dismissed by the trial court as being insufficient, but was upheld by the Supreme Court. The court held that in assessing a motion to dismiss the facts alleged are admitted and the sole question is whether the complaint contains allegations affording sufficient notice of the claim to advise the defendant of the relief sought.

In a tort action, *Spomer v. City of Grand Junction*,[4] a claim was made that the city, in the operation of a cemetery, had wrongfully removed a body from a burial lot, and the trial court sustained a

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1 355 P.2d 1089 (Colo. 1960).
2 80 Colo. 40, 249 Pac. 259 (1926). See also 47 A.L.R. 1108 (1927); Colo. R. Civ. P. 117.
3 353 P.2d 373 (Colo. 1960).
4 355 P.2d 960 (Colo. 1960).

motion to dismiss at the close of the plaintiff's case. In reversing the trial court, the court said:

> Under the Rules of Civil Procedure the main purpose of the complaint is to furnish notice to an adversary of the transaction or occurrence complained of. If a party states *any* claim and proves it by a preponderance of evidence, he is entitled to relief. As was said in *Bridges v. Ingram,* 122 Colo. 501, 223 P. (2d) 1051, 1054:
> '* * * If sufficient notice concerning the transaction involved is afforded the adverse party, the theory of the pleader is not important. If, under the facts, the substantive law provided relief upon any theory, the cause should proceed to judgment. * * *'
>
> Rulings of this court under former practice and procedure that pleadings are construed most strongly against the pleader are not in harmony with present day procedure in civil actions. The rule now is that pleadings are to be construed in favor of the pleader. It necessarily follows that issues joined upon matters which are immaterial to a claim are surplusage and need not be proved. So in the case before us if any of the allegations of the amended complaint gave notice to the defendants of a claim for relief and there was some competent evidence produced at the trial upon which relief could be granted, a dismissal of the action was not in order.[5]

Cline v. Whitten[6] came before the court after judgment was entered on a motion to dismiss. The plaintiff had sought to have its rights determined and to obtain protection against interference with the storage of water coming from springs. The defendant's motion set forth that the complaint failed to state a claim against the defendant upon which relief could be granted, and that the relief could only be obtained in a proceeding for the adjudication of the rights of all parties in the water district in which the right was claimed.

In reversing the trial court, the court said that the plaintiff's complaint stated facts which if proven entitled plaintiff to the injunctive relief sought.

Malicious prosecution was the allegation of the plaintiff in *Lowen v. Hilton.*[7] The plaintiff contended that a hold and treat order entered out of the county court on the basis of a letter from Doctor Hilton which was obtained through the plaintiff's brother. Subsequently, the county court found that the plaintiff was not insane, and the complaint was filed shortly thereafter. The defendants all filed motions to dismiss, and the motions were sustained. The defendants contended that the one-year statute of limitations for false imprisonment barred the action.[8] The two-year statute of limitations protecting those in the healing arts was also looked to as a bar by Doctor Hilton.[9] Another statute pleaded as an affirmative defense provides in part: "Such order of the court shall be a complete protection for the confinement, examination, diagnosis,

5 *Id.* at 962-63.
6 355 P.2d 306 (Colo. 1960).
7 351 P.2d 881 (Colo. 1960).
8 Colo. Rev. Stat. § 87-1-2 (1953).
9 Colo. Rev. Stat. § 87-1-6 (1953).

observation and treatment of such patient as against all persons."[10] The Supreme Court held that the affirmative defenses were not well taken. The statute of limitations was held to be inapplicable, and the court said:

> For purposes of the motion to dismiss, all facts alleged in the complaint must be assumed to be true. We are satisfied that it was not the intention of the legislature to leave a person without a remedy of any kind who admittedly has been subjected to the grievous wrongs here alleged to have been committed by the defendants.
>
> The purpose of the statute relied on for dismissal is to protect those persons who, following the entry of the 'hold and treat' order, have the responsibility pursuant to said order 'for the confinement, examination, diagnosis, observation and treatment of such patient.'
>
> A person who admittedly has been maliciously wronged by persons who conspire to prosecute him as an insane person without probable cause, cannot be deprived of a judicial remedy for the wrong. Had the legislature intended any such result, which we think it did not, the statute would be of doubtful validity when subjected to the test of Article II Section 6 of the Constitution of Colorado . . . .[11]

In *Knowlton v. Cervi*,[12] the court held that a complaint in a libel suit must state a claim upon which relief may be granted and

10 Colo. Rev. Stat. § 71-1-3 (3) (1953).
11 Lowen v. Hilton, *supra* note 7 at 883.
12 350 P.2d 1066 (Colo. 1960).

that a trial court may grant a motion to dismiss in a libel action as well as in other suits, and affirmed the trial court's granting of the motion to dismiss.

In *Flank Oil Co. v. Tennessee Gas Transmission*,[13] a case brought under the Colorado Unfair Practices Act,[14] the plaintiff sought a temporary and permanent injunction. The defendants moved to dismiss, questioning the constitutionality of the Act, and the indefinite language of the statute. The motions to dismiss were sustained, and the plaintiffs elected to stand upon the complaint as filed and prayed that a final judgment of dismissal be entered. In reversing the trial court, the Supreme Court held that the issue of the constitutionality of the statute could be determined on a motion to dismiss, but upheld the statute and pointed out that the questions raised were not constitutional in nature and that the problems urged as grounds for upholding the judgment of dismissal were premature and must await the trial of the case.

In examining the powers of district judges sitting separately in the same county, the Supreme Court in *Denver Electric & Neon Serv. Corp. v. Phipps, Inc.*[15] upheld the trial judge's dismissal of various claims set out in the plaintiff's complaint which had been previously held to be sufficient by a different trial judge in the same county and said that the order denying the motion to dismiss could be modified or changed under the limitations of Colo. Rev. Stat. § 37-4-18 (1953).

In *McPherson v. McPherson*[16] the court found that a claimant against an estate had been denied his day in court by summary dismissal of his claim after the court had determined that the hearing on the claim should be in accordance with the Rules of Civil Procedure. A motion to strike had been treated by the trial court as a motion to dismiss and was argued as a defense of laches and the statute of limitations. The court held that the statute of limitations is not grounds for a motion to dismiss for failure to state a claim upon which relief can be granted and pointed out that the statute of limitations and laches must be affirmatively pleaded in an answer under Rule 8(c) and could have only been properly determined after a full hearing on the merits.

B. Judgment on the Pleadings

Flavell v. Dep't of Welfare[17] reversed an order granting judgment on the pleadings. The action was one to recover the unpaid balance on a promissory note and the execution of the note was admitted. Affirmative defenses were pleaded before the trial court by way of answer, counterclaim, and reply. The court found that the allegations in the pleadings raised issues of both fact and law which must be presumed to be true for the purpose of considering a motion for judgment on the pleadings and remanded the case for trial on the merits.

C. Bill of Particulars

In affirming the judgment of the trial court in *Sheldon v. Schmidt*,[18] the court cast aside the argument that error had been

13 349 P.2d 1005 (Colo. 1960).
14 Colo. Rev. Stat. § 55-2-1 (1955).
15 354 P.2d 618 (Colo. 1960).
16 358 P.2d 478 (Colo. 1960).
17 355 P.2d 941 (Colo. 1960).
18 351 P.2d 288 (Colo. 1960).

committed by the denial of a bill of particulars in a debt action and said:

> The granting or denying of a motion to make a pleading more definite and certain *lies* within the sound discretion of the trial court and its ruling on such a motion will not be disturbed in the absence of a clear showing of an abuse of discretion and prejudice to the party affected.
>
> The defendant here made no effort to avail himself of the many procedural steps open to him under the rules whereby he could have obtained the information he claimed he needed in order to answer the complaint. When the amended complaint was filed, he promptly answered and again did nothing to obtain more definite information from the plaintiff. The evidence at the trial shows that many of the facts sought in his motion were known to the defendant before the suit was filed.
>
> We are persuaded that no prejudice resulted to defendant by refusal of the court to grant his motion to make more definite and certain; nor did the court abuse its discretion in denying the motion.[19]

RULE 15

The right to amendment was declared to be sacrosanct in *Renner v. Chilton*.[20] Claims had been made in the trial court which did not withstand a motion to dismiss, and the trial judge refused to allow the plaintiff to amend his complaint on his oral motion and stated that the entire complaint seemed to be based on judicial or semi-judicial proceedings which were privileged. The court affirmed the trial court's finding of privilege, but held that under Rule 15(a) a party is entitled to one amendment as a matter of right when a responsive pleading has not been filed.

RULE 38

In an action to recover an attorney's fee, *Jaynes v. Marrow*[21] brough into play Rules 38 and 39. When the original complaint and answer were filed neither party made demand for a jury trial. Nearly a year after the case was at issue and shortly before trial the defendant filed a demand for a jury trial, and a jury trial was ordered over the objection of the plaintiff. The jury returned a verdict for the defendant, and on writ of error it was argued that the defendant had waived his right to a jury trial as a matter of law by his belated request. In analyzing Rule 38 the court pointed out that a litigant could secure a jury trial as a matter of right by complying with the requirements of the rule, but held that the trial court, in its discretion, under Rule 39, notwithstanding the failure of a party to demand a jury trial, could order a trial by a jury on any or all issues. The court refused to follow the federal rule, which imposes a severe limitation on belated jury requests and limits the discretion of the trial judge, and said: "Trial courts, either with a belated motion before them, with or without reasons stated therein, or without any motion at all, may order a jury trial, because it is within their discretion so to do."[22]

19 *Id.* at 289-90.
20 351 P.2d 277 (Colo. 1960).
21 355 P.2d 529 (Colo. 1960).
22 *Id.* at 530.

A declaratory judgment action furnished the background for *Baumgartner v. Schey*[23] and an interpretation of Rule 38 in connection with Rule 57. The question before the court in the declaratory judgment action was whether the actions and conduct of the parties had extended a written lease for farm land for an additional year. The trial court granted trial to a jury but reserved its judgment on the question of whether the defendants were entitled to a jury trial in view of a claim made by the plaintiff for an accounting in connection with the declaratory relief sought. The jury returned a verdict for the defendants which the trial court set aside. In reversing the trial court, the court held that the right to a jury trial is to be determined by whether the right existed prior to the passage of the Declaratory Judgment Act in the particular type of action before the court, and held that all of the pleadings, as well as all issues and evidence, must be examined to determine whether the issues were legal or equitable, and that joinder of legal and equitable remedies would not deprive a party of the right to jury trial on legal issues.

It was urged in *McGregor v. Porter*[24] that a request for a jury trial, made at the pretrial conference, which was not ruled upon, constituted grounds for reversal after trial was completed to the court, without objection. The court found that trial to a jury had been waived.

23 353 P.2d 375 (Colo. 1960).
24 354 P.2d 489 (Colo. 1960).

RULE 42

Droghei v. Meehan[25] involved the interpretation of Rule 42 after two damage actions had been consolidated for trial. The facts were the same in both actions, the witnesses were identical, and they were competent to testify in each suit. The court found that there was no abuse of discretion by the trial court consolidating the two actions for trial.

RULE 43 (b)

The question before the court in *Van Hise v. Trino*[26] was whether the trial court committed prejudicial error in denying counsel for the defendant the right to cross-examine the defendant upon the subject matter of the examination in chief after the defendant was called as an adverse witness for cross-examination under Rule 43 (b). The court acknowledged the defendant's contention that Rule 43 (b) grants the right of cross-examination at the time a party is called as an adverse witness for cross-examination but found no prejudice by reason of the fact that the defendant took the stand on her own behalf and presented her testimony fully to the court.

RULE 44

Rule 44 (a) was the key issue in *Superior Distrib. Corp. v. Hargrove*[27] when the plaintiff sought to enforce an Oklahoma judgment. The record before the trial court consisted of *certified copies* of various instruments from the court of common pleas of Oklahoma and formed the basis of the trial court's judgment. In reversing the lower court and remanding the case for new trial, the court said:

> *Were these certified copies such as to comply with R.C.P. 44(a)?*
>
> The question is answered in the negative.
>
> The rule provides:
>
> 'An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof, or by a copy attested by the officer having the legal custody of the record or his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. * * *.'
>
> There is a difference between a certified copy of a record and one made according to the rule. The rule is plain and is in full force and effect. It was not followed.
>
> The court erred in the first instance in admitting these documents into evidence. Had it ruled properly thereon, plaintiffs might have been able to prove the judgment through other methods as provided in R.C.P. 44 (c):

25 353 P.2d 98 (Colo. 1960).
26 352 P.2d 284 (Colo. 1960).
27 355 P.2d 312 (Colo. 1960).

> 'This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.'[28]

The procedure to be followed in enforcing foreign judgments was made crystal clear by the court in a series of decisions.

In *Ginsberg v. Gifford*[29] the plaintiff was the assignee of a California superior court judgment. The record before the trial court included a verified complaint, a summons, an affidavit of service, an affidavit *re* military service, a written application for entry of the default, an entry of default, and a certificate of the clerk declaring that the judgment had been entered and that no appeal had been taken or any order entered modifying or vacating the judgment. The plaintiff also offered by way of evidence the California Interest Statute and the California Constitution showing jurisdiction in the superior court. The trial court held that the complaint was insufficient and contained no averment that the foreign judgment was valid, final, and enforceable under the laws of the State of California and that the element of present enforceability was totally lacking in the complaint. It dismissed the complaint pursuant to the defendant's motion. The complaint provided that a judgment had been entered and stated the amount due and owing. The Supreme Court held that a *prima facie* case was shown and that the trial court had erred in dismissing the complaint.

In *Superior Distrib. Corp. v. Zarelli*[30] the sole issue was whether the trial court erred in failing to grant the defendant's motion to dismiss after the plaintiff had rested his case and the defendant elected to stand on its motion. The suit was to recover a judgment which was entered in favor of the plaintiff in the superior court of Washington. The defendant contended that the complaint was defective because it failed to allege that the Washington judgment was a valid and final judgment capable of being enforced in that state and relied on *Gobin v. Citizens' State Bank*.[31] The defendant's contentions, however, were cast aside when the court ruled:

> These allegations in substance allege that the judgment was a valid and final adjudication remaining in full force in the state of its rendition and capable of being there enforced by final process. Under our liberalized rules of civil procedure it is the substance of the complaint rather than the form that is paramount. We thus hold plaintiff in error's contention that the failure to include the allegation in the exact words stated in the Gobin case constitutes reversible error to be without merit. . . .[32]

In *Blackmon v. Klein*[33] the court again had occasion to examine the procedure for the enforcement of a foreign judgment. A Wyoming judgment was the subject of the suit and the defense interposed in the trial court was the statute of limitations. In affirming the lower court, Colo. Rev. Stat. §§87-1-22 and 87-1-30 were interpreted and the court found that the statute of limitations did not

28 *Id.* at 313.
29 355 P.2d 657 (Colo. 1960).
30 352 P.2d 967 (Colo. 1960).
31 92 Colo. 350, 20 P.2d 1007 (1933).
32 Superior Distributing Corp. v. Zarelli, 352 P.2d 967, 968 (Colo. 1960).
33 357 P.2d 91 (Colo. 1960).

bar the action under the statutes cited by reason of the fact that the defendant had absented himself from the State of Colorado and had tolled the statute of limitations.

However, in *Superior Distrib. Corp. v. McCrory*[34] the court reversed a judgment in favor of the plaintiff on a Florida judgment, finding that the judgment was conditional by nature and stated:

> We consider the circumstances allegedly furnishing a ground for reversible error. At the conclusion of McCrory's evidence Superior moved for dismissal, submitting that the Florida judgment was 'totally interlocutory'; that until the conditions imposed upon McCrory had 'been done, this (was) not in fact a final judgment and (McCrory was) not entitled to recover because the Court specifically states that he shall be entitled to a final judgment upon doing so.' It is claimed that denial of this motion was error.
>
> The resolution of this point makes unnecessary the consideration of other questions presented. Decided cases point to an impediment in the maintenance of the suit on the Florida judgment, i.e., a contingent, inconclusive adjudication, interlocutory in nature.
>
> While the judgment of one state is entitled to receive the same faith and credit given it in the state where entered, yet it is necessary 'that, in order to maintain an action in one state upon a money judgment recovered in another state, such judgment must be a final adjudication, in full force in the state where rendered and capable of being enforced by final process, and ordinarily it should create a definite and absolute indebtedness against the judgment debtor.' . . .[35]

RULE 54(b)

In construing Rule 54(b) and the final judgment requirements of Rule 111(a) the Supreme Court found that there was no final judgment and dismissed a writ of error in *Fidelity & Deposit v. May*.[36] The case involved multiple claims and multiple defendants. One defendant obtained a summary judgment in the trial court and

34 356 P.2d 961 (Colo. 1960).
35 *Id.* at 962.
36 350 P.2d 343 (Colo. 1960).

the plaintiff caused a writ of error to issue. The plaintiff contended in the Supreme Court that there was no final judgment and filed a motion which was sustained. The court said in interpreting Rule 54(b):

> Construction of this rule and its application to the entry of a summary judgment in favor of less than all the parties in a multiple claim situation was had in the case of *Broadway Roofing and Supply, Inc. v. District Court,* 140 Colo. [154], 342 P. (2d) 1022. Our disposition of that case furnishes a guide and precedent for the instant case. In that case we held that, in order to effect a final judgment or final disposition of the case, thus rendering it reviewable by this court, the trial court should have (1) expressly determined that there was no just reason for delay, and (2) expressly directed the entry of a judgment.
>
> There is finality in what the trial court did in the instant case, but finality under the rule contemplates more than the rendition of a judgment. A rule has been established which, in definitive language, directs what must be done where multiple claims are involved and less than all of them decided.[37]

The publicized knitting machine cases found their way to the court in *Berry v. West Knit Originals, Inc.*,[38] when eighty-one plaintiffs claimed they were induced to purchase knitting machines by fraudulent representations. All the defendants did not appear before the Supreme Court. The case was viewed by the Supreme Court after the trial judge granted a motion to dismiss as to two defendants. In interpreting Rule 54 (b) and Rule 111 (a) and the requirement that there be a final judgment before a writ of error could issue, the court held that a judgment or decree is not final which determines the action as to less than all of the defendants unless the requirements of Rule 54 (b) are met.

RULE 55

In *Radinsky v. Kripke*[39] the sole question was whether the trial court abused its discretion in dismissing an action with prejudice for failure to prosecute. Dissolution of a law partnership formed the background of the action. The trial court appointed a referee to conduct an accounting and the hearings were delayed over a long period of time. Dismissal took place under Rule 18 of the district court, which provides:

> Dismissal of Actions—Failure to Prosecute, etc. Payment of Costs
>
> Sec. 1. The Clerk of this Court, at the opening of the September Term of each year, shall report to the Judges such cases as may be pending in their respective Civil Divisions, in which no order or progress has been made and entered of record for a period of twelve (12) months. All such cases shall be dismissed with prejudice thirty days after service of written notice by the Clerk to attorneys of record or parties, at their last known addresses, unless good

37 *Id.* at 343-44.
38 357 P.2d 652 (Colo. 1960).
39 354 P.2d 500 (Colo. 1960).

> cause shall be shown why the same should not be dismissed.[40]

The trial court found that the plaintiff was under a duty to go forward and did not show diligence. In reversing the judgment of dismissal and directing that a new referee be appointed to carry out the accounting, the court said:

> It has been held in Colorado that a delay occasioned by the failure of an officer of the court (the Clerk) in circumstances where the plaintiff has not failed to comply with any legal requirements, is not grounds for dismissal for failure to prosecute. [citations] . . . This rule extends to delays occasioned by all officers of the court, including masters and referees.
>
> An additional reason also exists requiring reversal here.
>
> If the Findings and Judgment of the trial court were meant to be a default judgment, then we find no compliance with our Rules of Civil Procedure which provide how judgments by default must be entered after proper motion therefor with notice (Rule 55). And if this be considered an involuntary dismissal it failed to comply with Rule 41 R.C.P. Colo., which also requires a motion; and then notice thereof must be given as required by Rule 5 . . . .
>
> Also, it is obvious that the trial court failed to follow its own Rule XVIII, which did not apply. This is so because no written notice was given as required therein and if it had been given then this record discloses 'good cause' why the action should not have been dismissed.[41]

RULE 56

The Supreme Court did not extend its interpretation of Rule 56 in 1960, although it did sustain two summary judgments. The law on summary judgments was reannounced by the court in the case of *Credit Inv. & Loan Co. v. Guar. Bank & Trust Co.*[42] The plaintiff in his complaint charged breach of contract and malicious interference with contract. The defendant interposed a motion to dismiss and a motion for summary judgment, and the motions were granted. The defense motions were not supported by affidavit but testimony was taken and interrogatories were offered to buttress the motions. In reversing the trial court for dismissing the complaint and issuing a summary judgment, the Supreme Court found that there were genuine issues of fact and repeated the oft-quoted law on summary judgments:

> Granting summary judgment on the record before us was error. A summary judgment may be granted only where there is no genuine issue as to any material fact. Rule 56, R.C.P. Colo. We have many times held, and again reiterate that a summary judgment is a drastic remedy, never warranted except in the complete absence of any

40 *Id.* at 501.
41 *Id.* at 502.
42 353 P.2d 1098 (Colo. 1960).

> genuine issue of material fact. All doubts with respect thereto must be resolved against the mover [citations] . . . . . It requires no strained mental exercise to reach the conclusion that each of plaintiff's alleged claims, if proved, states a claim upon which relief may be granted, and that none is vulnerable to a motion to dismiss.[43]

In *Avery v. City of Fort Collins*[44] the court again reversed a summary judgment that came before the court with a claim that res judicata barred the prosecution of the action before the trial court. The plaintiff had commenced a class action for a declaratory judgment, and that action was dismissed on the defendant's motion and the judgment affirmed by the Supreme Court when the plaintiff elected to stand on the complaint filed.

The second action, *Avery v. City of Fort Collins*,[45] was a taxpayer's action seeking a different remedy than that sought in the first case and caused the court to lay down the following law:

> In this jurisdiction the dismissal of a case without prejudice does not bar a subsequent suit by the same parties on the same cause of action . . . . Here the actions were not identical, the plaintiffs appear in a different capacity and additional parties are involved.
>
> Defendants argue that a writ of error to this court from the original judgment resulting in affirmance, alters the rule. The plaintiffs having 'elected to stand on their complaint' rather than amend it initially, cannot maintain a second suit. We are persuaded, however, that the rule posed by defendants applies only when the original judgment is entered on the merits. . . . Where a defective or improper complaint has been dismissed without prejudice and review sought in the Supreme Court resulting in an affirmance, a new action may thereafter be commenced. . . .[46]

In accord was *Hizel v. Howard*[47] where the court said: . . . For the plea [of res judicata] to be a complete defense, there must be 'identity of subject matter, identity of cause of action, identity of persons to the action and identity of capacity in the persons for which or against whom the claim is made.' Judgment on the merits precludes not only matters determined and actually litigated but also all matters pertaining to the issues which could or might have been litigated therein. . . .[48]

The court did not hesitate to approve the granting of a summary judgment in *Vessells v. Davidson Chevrolet*[49] where a new action was commenced to relitigate and collaterally attack former judgments.

In *King Collection Bureau v. Burns*[50] a summary judgment was also upheld. The facts behind the court's decision were that the note which was the subject of the suit contained a provision allowing payment in cash or by the surrender of securities which had

43 *Id.* at 1100.
44 131 Colo. 34, 278 P.2d 1017 (1955).
45 351 P.2d 286 (Colo. 1960).
46 *Id.* at 287-88.
47 354 P.2d 611, 612 (Colo. 1960).
48 See Benson v. Bottger, 354 P.2d 601 (Colo. 1960).
49 355 P.2d 121 (Colo. 1960).
50 354 P.2d 609 (Colo. 1960).

been purchased and paid for in part by the execution of a note and the entire transaction was set out in the pleadings. The plaintiff attempted to urge a parol agreement, but the Supreme Court, in sustaining the summary judgment, found that there was no issue of fact to be determined and that any ambiguities had been disposed of through the pleadings.

In a bailment action, *Lutz v. Miller*,[51] a motion for summary judgment was interposed after an answer was filed. The answer contained a motion to dismiss for failure to state a claim upon which relief could be granted and the trial court sustained the motion for summary judgment. In analyzing the complaint and the issues, the Supreme Court held that the complaint was sufficient and that there were issues of fact yet to be determined and remanded the case for further proceedings.

RULE 59

The procedure necessary to protect a successful jury verdict that fails to withstand a motion for a new trial was clarified by the court in *Chartier v. Winslow Crane Serv. Co.*[52] and *Mobley v. Cartwright*.[53]

In *Chartier v Winslow Crane Serv. Co.*[54] the plaintiff won a verdict of $50,531 from the jury and then saw his verdict fail when the trial judge granted the defendant's motion for a new trial. The plaintiff elected to stand on the record as made and the trial court dismissed the action. The Supreme Court in reviewing the record said that in Colorado the plaintiff may elect to stand on the order granting the new trial and obtain a dismissal of the action and review of the trial court's order in the Supreme Court. In reinstating the verdict of the jury and reviewing the record the court said, in laying down the so-called non-suit rule, that the test on review is whether there is substantial [though conflicting] evidence in the record to support the jury verdict. This evidence must be considered in the light most favorable to plaintiff and the presumptions favor the verdict rather than the final judgment of dismissal. The reason for adoption of this test is that the judgment of dismissal is actually a court determination that the evidence was not substantial and that a motion for dismissal or a non-suit should have been granted at the end of the plaintiff's evidence.

In a damage action, *Mobley v. Cartwright*,[55] the plaintiff obtained a jury verdict which did not withstand the defendant's motion for a new trial. On retrial the defendant was successful and the plaintiff moved to set aside the verdict in the second trial and to reinstate the verdict returned by the jury in the first trial on the allegation that the trial court erred in granting a new trial. The plaintiff also filed a motion for judgment notwithstanding the verdict and a motion for new trial, but both motions were denied. The Supreme Court found that there was only one final judgment, the judgment which followed the second trial, and said that the plaintiff, if aggrieved by the granting of the motion for new trial, should have preserved his right to review upon that issue by standing

51 356 P.2d 242 (Colo. 1960).
52 350 P.2d 1044 (Colo. 1960).
53 348 P.2d 379 (Colo. 1960).
54 350 P.2d 1044 (Colo. 1960).
55 348 P.2d 379 (Colo. 1960).

upon the record as made and affirmed the judgment of the trial court. When the plaintiff went to trial, he had waived any error that the court might have committed in the first trial.

RULE 65

A tax-exempt status was in issue in *City and County of Denver v. Spears Free Clinic and Hosp. for Poor Children.*[56] Spears claimed exemption from taxation as a charitable institution under Colo. Rev. Stat. § 137-12-3(8) and article X, section 5 of the Colorado Constitution and sought a declaratory judgment and injunctive relief in the trial court. The trial court granted the relief, and on writ of error the Supreme Court affirmed the judgment and held that the trial court had jurisdiction to determine the issue and that there was substantial evidence in the record to support the trial court's ruling.

In *Crosby v. Watson*[57] the Supreme Court reviewed the trial court's denial of an application for a preliminary prohibitory injunction. The plaintiffs claimed for their title an easement for ingress and egress over the defendant's land and relied solely upon adverse possession. The trial judge took evidence and viewed the premises. In affirming the decision of the trial judge, the court said:

> Our former decisions, to which we adhere, hold that the granting or denial of a preliminary injunction is a matter in the sound discretion of the trial court and that its determination with reference thereto will not be disturbed except in case of abuse of discretion. . . . It is equally well settled that the findings of fact of the trial court, if based upon substantial competent evidence, are binding upon this court, and that we will not substitute our conclusions from the facts for those of a trial court. This is so even though there be credible evidence warranting findings different from those of the trial court. . . .
>
> . . . Plaintiffs insist that a preliminary injunction should have been ordered to preserve the *status quo* of the parties until a determination of their rights can be made upon final

56 450 P.2d 1057 (Colo. 1960).
57 355 P.2d 958 (Colo. 1960).

hearing. Had a clear right to a temporary injunction been shown, plaintiffs' contention would be correct. Injunctive relief should not be loosely granted. Plaintiffs, as well as the defendants, will have an opportunity to present their case in full at a trial on the merits.

Concluding as we do that the matter was one resting in the sound discretion of the trial court, the order denying the motion for a preliminary injunction is affirmed.[58]

Of like effect is *Allen v. City and County of Denver*,[59] where the Supreme Court sustained the trial court's refusal of a temporary injunction. The accumulation of water in southwest Denver precipitated the suit, and an extensive hearing on the injunction issue followed. The Supreme Court found no abuse of discretion in the denial of an injunction and affirmed the judgment as being within the sound discretion of the court.

RULE 83

To obtain uniformity and to prevent conflicts in the rules of the various courts the Supreme Court amended Rule 83 on December 8, 1960, to read as follows:

Each trial court by action of a majority of its judges may from time to time make and amend rules governing its practice not inconsistent with these rules nor inconsistent with any directive of the Supreme Court. Local rules adopted hereunder shall not restrict the authority of the presiding judge of said court to adopt and enforce administrative rules, not inconsistent with any directive of the Supreme Court, relating to assignment of cases, dockets, and procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Copies of proposed rules or amendments to be made by any court, before their adoption, shall be furnished to the Supreme Court for its approval. In all cases not provided for herein, trial courts may regulate their practice in any manner not inconsistent with these rules.

RULE 98

A motion for change of venue was held to be a matter of right in *Cliff v. Gleason*.[60] The principal case involved construction of a listing agreement that was to be performed in Jefferson County where the defendant was served and resided. The trial court denied the motion for a change of venue and found for the plaintiff. The court said: "When, as here, an application sufficient in form, uncontradicted, and supported by allegations in the plaintiff's complaint itself, is made for a change of place of trial, the Court has jurisdiction of the cause only for purpose of removal to the proper county."[61]

RULE 102

Burt Chevrolet, Inc. v. Barth[62] appeared for the second time before the court. In *Barth v. Burt Chevrolet, Inc.*,[63] the court had

58 *Id.* at 959-60.
59 351 P.2d 390 (Colo. 1960).
60 351 P.2d 394 (Colo. 1960).
61 *Id.* at 396-97.
62 355 P.2d 538 (Colo. 1960).
63 140 Colo. 128, 342 P.2d 637 (1959).

reversed and remanded the case for a new trial. Barth filed a motion to dissolve the writ of attachment after the case was remanded and the motion was granted. On writ of error it was urged that the motion which was sustained in the trial court had been previously urged in the trial court and could have been questioned in the first proceeding before the Supreme Court, and in answer to the contention the court said:

> . . . Rule 102(aa) R.C.P. Colo. provides in pertinent part that: '* * * Any order by which an attachment or garnishment is released or sustained is a final judgment.'
>
> The original judgment entered by the trial court which sustained the attachment was a final judgment. No writ of error issued to review it. The parties to the action were then, and now are, bound by that judgment.
>
> . . . The final judgment upholding the writ of attachment, not having been questioned in the proceedings on error here, the trial court was precluded from reconsidering that issue.[64]

RULE 106

A. Prohibition

The restrictions on the use of original proceedings was made clear by the court in two decisions:

In *Bristol v. The County Court*,[65] the court had to determine whether the defendant in the district court had made a record which entitled him to a writ of prohibition. The defendant was sued on a promissory note in the county court and gave notice that he would take the deposition of non-resident officers of the plaintiff corporation. The parties named in the notice never appeared for depositions so the defendant moved to require attendance or in the alternative a dismissal of the complaint. The county court denied the motion and set the case for trial. The defendant thereupon commenced a proceeding in the district court seeking prohibition against further proceedings in the county court and alleging that the court had abused its discretion in refusing to require the plaintiff corporation's officers to appear for a deposition or forego the prosecution of its complaint. The district court issued a citation to show cause. At the hearing in the district court the county court defended its ruling on the basis of the defendant's lack of showing of adequate cause or the necessity for putting the plaintiff to the expense of bringing its officers into Colorado for the deposition when other means of discovery were available. The district court held that the county court had not abused its discretion and that the actions of the defendant were designed to obtain review of the county court's ruling rather than to show an abuse of discretion. On writ of error to the Supreme Court to review the judgment of the district court, it was held that a sufficient showing was not made to justify the use of prohibition, and that the district court properly discharged the rule under Rule 106(a)(4).

The rule to show cause was again discharged in *Retallack v. Police Court*[66] when an original proceeding in the nature of prohibition was filed in the Supreme Court challenging the jurisdiction of

64 355 P.2d 538, 539-40 (1960).
65 352 P.2d 785 (Colo. 1960).
66 351 P.2d 884 (Colo. 1960).

a municipal court in Colorado Springs to try the petitioner on a charge of reckless and careless driving. The basis of the petitioner's claim was the now famous *Merris case*.[67] The Supreme Court said:

> It is to be noted that although the Merris case . . . did establish the offense of drunken driving to be a statewide concern and governed by state statute, the most significant contribution to law in this state which arose out of that case was a guaranty to all citizens that trials for municipal violations in municipal courts would be in accordance with criminal process. That being the case, no person charged under a municipal ordinance can be prejudiced by leaving as much of local law intact as can be done without violating individual rights or undermining state sovereignty.[68]

In *Hollander v. Jacobucci*,[69] an original proceeding in the nature of mandamus or prohibition, the court made a rule to show cause permanent. In the principal case, the parents of a minor filed a complaint in the county court charging their minor daughter with delinquency. Over the protest of the minor's parents, an attorney sought leave to appear and defend the minor in the county court. The county judge prohibited the attorney from appearing, and the Supreme Court in its ruling held that all persons are entitled to counsel of their own choosing and that the selection of counsel cannot be dictated by those who instigated the action.

In *Van Gundy v. O'Kane*[70] the complainant sought a writ in the nature of prohibition to prevent further proceedings in the County Court of Jefferson County on traffic charges which previously formed the basis of a complaint before a justice of the peace court in Jefferson County. The district attorney *nolle prosequied* in the justice court, with the approval of the court, so that he might prosecute the traffic violations in the county court. Van Gundy filed a motion to dismiss in the county court on the ground that the entry of the *nolle prosequi* in the justice court for the purpose of refiling the action in a court of concurrent jurisdiction did not relieve the justice court of jurisdiction and enable the county court to proceed. The admitted reason for the district attorney's action was that Van Gundy had the audacity to ask for a jury trial in the justice of the peace court. In condemning the practice, the court elected to treat the complainant's motion to dismiss as a plea in abatement in the county court and sent the matter back for further proceedings in the justice court.

B. Quo Warranto

In *People ex rel Mijares v. Kniss*[71] the court considered the history behind the use of quo warranto and determined that the remedy was not available to oust officers of an unincorporated labor union on the ground that their election was effected by devious and unfair means. The district attorney refused to prosecute, and a suit under Rule 106(a) (3) followed.

In sustaining the trial court's judgment in favor of the defendants the court said:

67 137 Colo. 169, 323 P.2d 614 (1958).
68 351 P.2d 884, 886 (Colo. 1960).
69 349 P.2d 567 (Colo. 1960).
70 351 P.2d 282 (Colo. 1960).
71 357 P.2d 352 (Colo. 1960).

[Rule 106(a)(3)] . . . furnishes a substitute for the common law prerogative writ of quo warranto and the former statutory remedy in the nature of quo warranto. Notwithstanding the former remedies have been supplanted by Rule 106(a)(3), it must be remembered that '[e]ven under the Rules of Civil Procedure the *substantive aspects* of remedial writs are preserved, and relief of the same nature as was formerly provided in such proceedings may be granted in accordance with precedents established under the old practice.' (Emphasis supplied.) [citations]. . . .

While the procedural pattern has been simplified, the substance of what constitutes the basis of quo warranto relief remains the same. In order to prevail, proof of the substantive elements authorizing such relief should be of the same kind, quality and quantity as would have warranted a favorable judgment under the older forms. [citations]. . . . 'The various procedural changes * * * do not affect the basic purposes for which the writ was orginally designed' [citations]. . . .

Two reasons impel a holding that Rule 106(a)(3)

> may not be utilized by members of a labor union to dislodge other members from offices which they hold in the organization. We believe, first, that the context of the rule limits its application to *public offices*, and second, that a construction of the rule extending its application to test the title or right to a private office would invalidate it because such interpretation would result in an encroachment on the legislative prerogative.[72]

In *Colorado ex rel Gentles v. Barnholt*[73] the court found that quo warranto was the proper procedure to test the validity of the election of corporate officers and directors by reason of the fact that a corporation is a creature of statute. Suit was filed by a group of stockholders of Western Oil Fields, Inc., after the district attorney refused to institute an action. The complaint alleged that certain stock was issued to a non-resident after a contested corporate election was held and that the stock was then voted retroactively to obtain victory for the incumbent slate of directors. A motion to dismiss for failure to join the late voting, non-resident stockholder was sustained in the trial court and reversed on writ of error. The defendants contended that the non-resident stockholder was an indispensable party and that the plaintiffs had also failed to join the corporation in the suit, which also came within the category of an indispensable party. The Supreme Court agreed that the corporation was a necessary party, but held that the non-resident stockholder was not a necessary party. In the court's opinion, it was clear that if personal service of process was required upon the non-resident stockholder, then the shareholders' right of action would be destroyed or would have to be held in abeyance until the non-resident happened to venture into Colorado where he could be served. Such a result, the court felt, would deprive the plaintiffs of a remedy. The case was remanded to the trial court with directions to vacate the judgment of dismissal and to grant leave to the plaintiffs to bring in the corporation as a party defendant and then determine the matter on the merits.

In *People v. Colorado High School Activities Ass'n,*[74] a complaint was filed as a class action on behalf of a group of citizens, residents, taxpayers, and voters under the provisions of Rule 106 (a) (3) questioning the legal existence, constitutionality, and validity of the operations and expenditures of the Colorado High School Activities Association. The complaint was captioned quo warranto, injunctive, and other relief. The respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The motion was granted, but no formal judgment of dismissal entered. On writ of error, the court pointed out that the relief sought was properly obtainable by way of an action for a declaratory judgment or an action in the nature of quo warranto and found that the complaint was sufficient to test the franchise in issue. The complaint before the court asked relief against parties who were not named as defendants and were not served with process, and, therefore, who were indispensable parties not before the court. The case was remanded by the Supreme Court to the trial

72 *Id.* at 353-54.
73 358 P.2d 466 (Colo. 1960).
74 349 P.2d 381 (Colo. 1960).

court with directions to allow additional parties to be added and for proceedings consistent with the Supreme Court's opinion.

An original proceeding in quo warranto, *Warren v. People*,[75] sought to question the right of a county commissioner to hold office, but the issues were found to be moot after the commissioner, whose right to office was questioned, resigned. The court directed that the trial court determine issues which appeared in the original complaint but which were not before the court.

C. Non-Resident Motorist

Service of process under the Colorado Non-Resident Service Law[76] was questioned in three cases. Original proceedings were filed in the Supreme Court under Rule 106 alleging lack of jurisdiction in *Morrison v. Dist. Court*[77] and *United States Fid. & Gar. Co. v. District Court.*[78] In *Morrison v Dist. Court*[79] the complainant sought to prohibit the trial court from requiring further pleading in an action pending in the District Court wherein he appeared as defendant. An automobile accident gave rise to a complaint based upon the family purpose doctrine, and service was made under the Colorado Non-Resident Motorist Act.[80] The complainant filed a motion to quash the service which was supported by an affidavit alleging non-residence, absence from the state at the time of the accident, and the fact that the automobile was not a family car. The complainant also denied the authority of the secretary of state to accept service as his agent and contended that his son, who was the driver of the car, was not his agent, servant, or employee, and that he held the title to the car as a security device only. In reaffirming its earlier pronouncement in *Carlson v. Dist. Court*[81] the court held that the affidavit and motion filed by the complainant was couched with conclusions of law and was an attempt to equivocate. It said that where the conclusions of law set forth by the complainant were contradicted by facts appearing in the affidavits, the trial court was correct in adopting the facts rather than the conclusions. The court, in upholding the jurisdiction of the trial court, said that if it appeared in the trial court that the automobile involved in the accident was not within the family purpose doctrine, the complainant could not be held liable.

In *General Ins. Co. of Am. v. O'Day*[82] judgment was obtained by default after service was effected upon the secretary of state and a summons, complaint, and notice of service upon the secretary of state was sent to the defendant by registered mail and was returned marked "unclaimed." After default judgment was entered by the trial court, the plaintiff looked to the insurance carrier for payment of the judgment. The Supreme Court found that the judgment was void and that each step set forth in the non-resident service of process statute was jurisidictional and had to be strictly complied with. The defendant had not received or refused to accept the registered mail, and, therefore, service was never completed. The judgment was reversed.

75 354 P.2d 1021 (Colo. 1960).
76 Colo. Rev. Stat. §§ 13-8-1 to 13-8-4 (1953).
77 355 P.2d 660 (Colo. 1960).
78 353 P.2d 1093 (Colo. 1960).
79 355 P.2d 660 (Colo. 1960).
80 Colo. Rev. Stat. § 13-8-1 (1953).
81 116 Colo. 330, 180 P.2d 525 (1957).
82 356 P.2d 888 (Colo. 1960).

Original proceedings were also looked to in *United States Fid. & Guar. Co. v. Dist. Court*[83] to bar further action in the trial court. The complainant was garnisheed as the insurance carrier of a service man from Connecticut who was involved in an accident in Colorado while stationed on a military base in Colorado. Judgment was obtained by default in the trial court after service was effected under the non-resident motorist statute. In an answer to the garnishment, the complainant alleged that the court was proceeding without jurisdiction. In holding that a service man is a non-resident for the purpose of service, the court set out the purpose of the statute and discharged the rule, thereby upholding the service:

> The typical case which the statute is apparently designed to meet is where the defendant is only transiently operating a motor vehicle on the Colorado highways, although by its terms it is not limited to one making a continuous journey through the State, but covers any case where a non-resident, operating a motor vehicle in this State, causes damage.
>
> Upon the evidence submitted to the trial court it found that Shea was a non-resident of Colorado at the time of the accident, and there is ample competent evidence to sustain this finding. We cannot interfere with a finding so supported.[84]

RULE 111

The Supreme Court refused to countenance the instructions given on damages in *Kendall v. Hargrave*.[85] Neither party objected to any of the instructions given by the court, but the court, looking to the provisions of Rule 111 (f), found error appearing on the face of the record and in the interest of justice reversed the ruling of the trial court.

RULE 120

The court held in *Hastings v. Security Thrift & Mortgage Co.*[86] that Rule 98 had no application to a proceeding under Rule 120, and that a sale accomplished under Rule 120 on a note secured by a deed of trust did not constitute an adversary proceeding subject to review by writ of error. In dismissing the writ of error, the court declared that there was no requirement under Rule 120 that a suit be instituted in the county where the property described was located when sale was sought under the powers of the deed of trust.

83 353 P.2d 1093 (Colo. 1960).
84 *Id.* at 1094.
85 359 P.2d 993 (Colo. 1960).
86 357 P.2d 919 (Colo. 1960).